Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's	)	MM Docket No. 98-204
Broadcast and Cable	)	
Equal Employment Opportunity	)	
Rules and Policies	)	

REPLY COMMENTS OF NATIONAL ORGANIZATION FOR WOMEN NOW LEGAL DEFENSE AND EDUCATION FUND FEMINIST MAJORITY FOUNDATION PHILADELPHIA LESBIAN AND GAY TASK FORCE WOMEN'S INSTITUTE FOR FREEDOM OF THE PRESS

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SUMMARY

As numerous commenters in this proceeding have shown through studies and anecdotal evidence, the Commission's equal employment opportunity (EEO) rules for broadcasters and cable entities are still necessary. Continuing underrepresentation of women and minorities is particularly acute in upper level and management positions in the broadcast and cable industries. Anti-discrimination and broad outreach measures are essential to providing women and minorities not only with opportunities to enter the industry, but with opportunities to advance into leadership positions. Unfortunately, the industries' current outreach efforts are minimal at best and are not fostering true broad outreach. NOW *et al.* therefore support, and have made suggestions for expansion of, the Commission's EEO proposal, and NOW *et al*. urge the Commission to reject the broadcasters' proposals, which would not appreciably further broad outreach or equal employment opportunity.

Not only does the record reflect a factual need for an EEO program, but the Commission has also demonstrated its solid legal authority to craft and enforce the EEO rules. Contrary to the claims of broadcasters, vacating of past rules, recent Congressional silence, and limitations of other civil rights statutes do not undermine the Commission's EEO authority to continue to act in accord with its public interest mandate through an EEO program. And, because the Commission's proposed rules, and NOW *et al*.'s suggested modifications, are race and gender neutral, the rules must only pass the deferential arbitrary and capricious standard of review.

Just as broadcasters' current efforts fall short of true outreach, their latest EEO proposals would likewise fail to achieve broad outreach. First, proposals relying primarily on limited Internet recruitment, which fails to reach almost half of Americans, would not amount to broad outreach. Second, broadcasters have not shown that reliance on other government programs,

such as OFCCP, would apply to any significant number of entities. Finally, a program that permits self-design of illusory outreach initiatives without setting minimum standards and that requires only a fraction of the outreach contemplated by the Commission's proposal would not sufficiently advance the Commission's goals.

In the same way, broadcasters suggested exemptions to the Commission's proposal would thwart outreach and anti-discrimination goals. Exempting more stations by raising the station size threshold or including a smaller market exemption would omit necessary outreach at a crucial juncture as smaller stations often provide an entry into the industry. Exigent circumstances or unique job exemptions would likewise frustrate the Commission's goals by permitting perpetuation of word-of-mouth recruitment and exclusion of upper-level jobs from outreach.

Additionally, in order to have an effective EEO program, both the public and the Commission must have access to meaningful reports and records, certainly more than mere certifications of compliance. Public access to the reports and records will further dialogue between stations and their communities and aid the public in its enforcement support role. Moreover, entities should make their EEO reports available on station websites. As most stations currently maintain sophisticated, interactive websites, any burden in posting EEO reports should be minimal and also outweighed by the benefits of facilitating public access.

Finally, NOW *et al*. continues to support the Commission's proposals to retain the Annual Employment Reports (Forms 395-B, 395-A, and 395-M), which are not part of the EEO program requirements. The data collected from these reports permits the Commission to perform a Congressionally-mandated industry assessment and to determine the effectiveness of the new EEO rule.

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The National Organization for Women, NOW Legal Defense and Education Fund, Feminist Majority Foundation, Philadelphia Lesbian and Gay Task Force, and the Women's Institute for Freedom of the Press ("NOW *et al.*") respectfully submit reply comments in response to the *Second Notice of Proposed Rule Making* ("*Second NPRM*") of the Federal Communications Commission ("Commission") in the above-referenced proceeding, released December 21, 2001, concerning equal employment opportunity ("EEO") rules and policies.

In initial comments, NOW *et al.* and many other commenting parties, including both industry and public interest groups, have generally supported the Commission's proposed rules. In these reply comments, NOW *et al.* address the contentions made and alternatives proposed by the two parties that are the primary opponents of the Commission's proposals – the State

Broadcasters Associations ("State Associations" or "State Broadcasters") and the National Association of Broadcasters ("NAB").

At the outset, NOW *et al.* emphasize that the rules proposed by the Commission, even if modified along the lines NOW *et al.* suggested in initial comments, are entirely race and gender neutral. Therefore, if the State Associations and/or the NAB act on their threats to appeal the new rules,[1] the rules will not be subject to strict scrutiny, not even to intermediate scrutiny, but only to arbitrary and capricious review, the standard of review that is most deferential to agencies.

Furthermore, the State Associations and NAB mischaracterize this proceeding as "re-regulation,"[2] presumably in an attempt to make it more difficult for the Commission to adopt revised EEO rules. The Commission has never found the EEO rules unnecessary, and it only suspended them after the Court found the specific rules previously adopted by the Commission to be unconstitutional. Thus, when the Court assesses whether the new rules are arbitrary and capricious, the Commission need only show that it considered the relevant factors and provided a reasoned explanation.[3] Any suggestions by commenters that the Commission need establish more misapply or overextend court holdings.[4] Despite the claims of the State Broadcasters and the NAB, this Commission should have no difficulty making this showing.

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[1] *See, e.g.*, *Joint Comments of the Named State Broadcasters Associations ("State Association Comments"),* MM Docket No. 98-204, April 15, 2002, at 3-5*; Comments of National Association of Broadcasters ("NAB Comments"),* MM Docket No. 98-204, April 15, 2002, at 16-17 (2002) at v, 63.

[2] *State Associations Comments* at i-ii, 29-35; *NAB Comments* at iv.

[3] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) ("*Motor Vehicles*"). Furthermore, "the scope of review under [this] standard is narrow and a court is not to substitute its judgment" for that of the Commission." *See also Sinclair Broadcasting Group, Inc. v. FCC, et al.*, 284 F.3d 148, 159 (D.C. Cir. 2002) ("*Sinclair*"); *AT&T Corp. v. FCC*, 113 F.3d 225, 229 (D.C. Cir. 1997).

[4] Contrary to NAB's claim, *NAB Comments* at 69, the Commission need not meet the "substantial evidence" standard applied in *Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126, 1130-31 (D.C. Cir. 2001). The higher showing was required in *Time Warner* because, unlike the EEO rules, the ownership rules at issue in that case had an impact on First Amendment rights and were thus analyzed under intermediate scrutiny.

NOW *et al.* demonstrate the continuing need for EEO rules and that the Commission has ample legal authority to adopt such rules. NOW *et al.* then show that the alternatives proposed by NAB and the State Associations, which rely primarily on listing some portion of job openings on the Internet, are inadequate. Finally, NOW *et al.* object to proposals that would render reporting and recordkeeping ineffective and urge the Commission to reject proposed "exemptions" that would thwart the goal of broad outreach.

I. THE RECORD DEMONSTRATES THAT EQUAL EMPLOYMENT OPPORTUNITY RULES ARE STILL NECESSARY

Some commenters claim that equal employment opportunity rules are not necessary because the broadcast industry has achieved sufficient outreach and recruiting to permit "everyone seriously seeking employment in the industry [to] get timely information to pursue their goals."[5] However, the many commenters supporting the rules cite over two dozen different studies and extensive anecdotal evidence demonstrating that minorities and women continue to face inequality in the broadcast and cable industries.[6]

Because EEO reporting requirements have been suspended,[7] the Commission does not have a large amount of industry-collected data to assess. Nonetheless, studies done by the Radio-Television News Directors Association and Foundation (RTNDA) suggest the rise of potential discrimination within the industries during the suspension of the EEO rules and

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[5] *State Associations Comments* at i.

[6] *The American Federation of Television and Radio Artists (AFTRA) Comments,* MM Docket No. 98-204, April 15, 2002 , at ¶¶ 14-20; *American Women in Radio and Television (AWRT),* MM Docket No. 98-204, April 15, 2002, at 2-6; *Lawyers' Committee for Civil Rights Under Law and People for the American Way Foundation (Lawyers' Committee Comments)*, MM Docket No. 98-204, April 15, 2002, at 4-5; *Minority Media and Telecommunications Council, et al. (MMTC et al.),* MM Docket No. 98-204, April 15, 2002 , at 35-54; *National Organization for Women Comments (NOW Comments),* MM Docket No. 98-204, April 15, 2002 , at 2-4; and *Comments of Radio One,* MM Docket No. 98-204, April 15, 2002, at 5-6. *See also* comments of *National Association for the Advancement of Colored People (NAACP),* MM Docket No. 98-204, April 15, 2002.

[7] *State Associations Comments* at 4. The hiatus occurred because the rules were suspended in September 1998 after the *Lutheran Church* decision, then reinstated in April 2000, and again suspended in January 2001 following the *Association* decision. *Suspension of the Broadcast and Cable Equal Employment Opportunity Outreach Program Requirements*, 16 FCC Rcd 2872 (Jan. 31, 2001).

document the persistent homogenization of the upper levels of the broadcast workforce.[8] According to the RTNDA study based on data collected at the end of 1999, "[a] full year after the [EEO] guidelines were eliminated, the radio news work force is now 90 percent white—up from last year's 89 percent."[9] The percentage of minority radio news directors dropped from eight percent in late 1998 to approximately four and a half percent in 2000.[10] In television, minorities held only eight percent of news director positions in 2000, compared to fourteen percent in 1999.[11] The RTNDA studies also illustrate that women have been increasingly absent from management positions. The percentage of women television news directors dropped between 1999 and 2000, and the percentage of women radio news directors remained lower than what it was throughout most of the 1990s.[12] Similarly, the RTNDA study concluded that "[t]he white, male world of TV general managers is actually a bit more white and a bit more male this year than last," when evaluating employment numbers for the end of 2000.[13]

At the same time that minorities and women are losing ground, comments filed in this proceeding illustrate that the broadcasting industry has made only minimal efforts, independent of Commission regulation, to effectuate broad outreach during the time when the EEO rules were not in effect. For instance, the industry-touted National Alliance of State Broadcasters Association (NASBA) CareerPage[14] achieves very little outreach. Thirty-seven of the fifty states, Puerto Rico, and District of Columbia job banks on the CareerPage website have *no* job

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[8] Radio-Television News Directors Association & Foundation & Ball State University, *RTNDA/Ball State University Survey of Women & Minorities in Radio & Television News* (2001), *available at* http://www.rtnda.org/research/womin.shtml [hereinafter *2001 RTNDA Study*].
[9] Radio-Television News Directors Association & Foundation & Ball State University, *RTNDA/F Research 2000 Women & Minorities Survey* (2000), *available at* http://www.rtnda.org/research/womin.shtml [hereinafter *2000 RTNDA Study*].
[10] *See 2001 RTNDA Study*.
[11] *2001 RTNDA Study*.
[12] *2001 RTNDA Study*.
[13] *2001 RTNDA Study*. In 1999, 10 percent of TV general managers were minorities and 14 percent were women; in 2000, 8.7 percent of TV general managers were minorities and 12.6 percent were women. *2001 RTNDA Study*.

vacancy listings.[15] Among those with no job listings posted were some of the states with the most job opportunities in the industry, including California, Texas, New York, and Florida.[16] Further, a nationwide search conducted on the America's Job Bank website (also praised by broadcasters) yielded only forty-one broadcasting job listings.[17]

The comments further show that roughly half of the state associations do not participate in job fairs.[18] In addition, the size of many scholarship programs offered by the state associations pales in comparison to the size of the associations' membership. For example, the Texas Association of Broadcasters, which includes nearly one thousand radio and television stations across the state, will provide eight scholarships totaling $16,000 for the 2002-2003 school year, at a cost to each station of approximately $16.[19]

While the State Associations claim that EEO rules are unnecessary because EEOC, courts and state agencies can address discrimination,[20] the continuing disparities and inadequate outreach efforts show that reliance on other agencies is insufficient. Moreover, this argument ignores the Commission's responsibility to ensure that broadcasters meet their statutory duty to serve the public interest, an obligation not present in other industries or enforced by other agencies.

In sum, the record in this proceeding shows that women and minorities continue to encounter unequal employment opportunities and that the broadcast industry has done little since

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[14] *See State Associations Comments* at 14; *NAB Comments* at 20-21.
[15] *See* NASBA CareerPage at http://www.careerpage.org/jobbank/index.html, postings for all jobs from 1/01/01 through 5/6/02 were searched on 5/6/02.
[16] *Id.*
[17] The America's Job Bank site is located at http://www.ajb.dni.us. A keyword search of "Broadcast" was used on 5/6/02.
[18] *State Association Comments* at 15.
[19] See http://www.tab.org/join.html. The Texas Association of Broadcasters is the largest state broadcast association in the country, protecting the interests of Texas' 808 radio and 175 television stations before state and federal lawmakers and regulatory agencies.

the suspension of the Commission's former EEO rules to ensure equal opportunities. Based on this record, adoption of a revised EEO rule should easily be upheld under arbitrary and capricious review.

II. THE COMMISSION HAS THE LEGAL AUTHORITY TO PROMULGATE EFFECTIVE EQUAL EMPLOYMENT OPPORTUNITY RULES

In addition to having the requisite factual record, the Commission has the legal authority and obligation to promulgate effective EEO rules.

A. The Commission Clearly Detailed its Authority for Promulgating Equal Employment Opportunity Rules

Despite the contentions of some commenters questioning the Commission's legal authority to adopt revised EEO rules, the Commission's legal justifications are hardly "far from certain"[21] or "imagined."[22] Notably, the D.C. Circuit Court did not question the Commission's legal authority in the recent *Association* decision.[23] The very same court had previously requested that the Commission "determine whether it has authority to promulgate an employment non-discrimination rule" in the *Lutheran Church* case.[24] Responding to the that decision, the Commission's subsequent *Report and Order* exhaustively outlined the Commission's legal authority. [25] When the D.C. Circuit reviewed the rules promulgated as a result of the *Report and Order*, it did not question the Commission's assertion or sources of legal authority, and it even went so far as to repeat without objection the Commission's conclusion

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[20] *State Association Comments* at 35-39. *See supra* Section II.A. and accompanying text; 47 U.S.C. § 151 (2002) (emphasis added). *See Second NPRM* at ¶ 15; *Report and Order*, 15 FCC Rcd at 2349-50 ¶ 48.
[21] *Comments of National Association of Broadcasters In the Matter of Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, (*NAB Comments*), MM Docket No. 98-204, at 16-17 (2002) at 63.
[22] *State Associations Comments* at 31.
[23] *MD/DC/DE Broadcasters Ass'n. v. FCC*, 236 F.3d 13, 18), *cert. denied sub nom. MMTC v.MD/DC/DE Broadcasters Ass'n.,* 122 S. Ct. 920 (2002) ("*Association*") (*citing Report and Order*, 15 FCC Rcd at 2329 ¶ 4).
[24] *Lutheran Church Missouri-Synod v. FCC,* 141 F.3d 344, 356 (D.C.Cir.1998) ("*Lutheran Church*").

that its nondiscrimination and outreach goals were "'sufficient in themselves to warrant'" EEO rules.[26]

In the *Report and Order*, the Commission found that Section 634 of the Communications Act explicitly requires the Commission to regulate the EEO practices of cable entities.[27] The Commission also found that Section 334 "*requires* the Commission to regulate the EEO practices of television broadcasters."[28] The Commission found additional statutory authority in Section 309(j)'s "statutory goal of fostering minority and female ownership in the provision of commercial spectrum-based services."[29] Specifically, the Commission found the "employment of minorities and women in the broadcast industry greatly enhances the opportunities for minorities and women to own broadcast stations."[30]

The Commission further noted that when first adopting EEO requirements more than thirty years ago, it found that "discriminatory employment practices are incompatible with a station's obligation to operate in the public interest."[31] Since that time, "Congress has repeatedly expressed awareness of the rules and not only acquiesced in them, but has also referred to them approvingly."[32] Indeed, in the 1996 Telecommunications Act, Congress made clear that the Commission had a mandate to regulate all "communications services so that they

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[25] *In the Matter of Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, Report and Order ("Report and Order")*, MM Dkt No. 98-204, 15 FCC Rcd at 2335-58, ¶¶ 17-62 (Feb. 2, 2000).
[26] *Association*, 236 F.3d at 18.
[27] *Report and Order*, 15 FCC Rcd at 2335-36 ¶ 18.
[28] *Report and Order*, 15 FCC Rcd at 2337 ¶ 22 (emphasis in original).
[29] *Report and Order*, 15 FCC Rcd at 2346-47 ¶¶ 43, 44.
[30] *Report and Order*, 15 FCC Rcd at 2349 ¶47.
[31] *Report and Order*, 15 FCC Rcd at 2338 ¶ 23. Specifically, the Commission cited Section 4(i), 303, 307, 309 and 310 of the Communications Act, 47 U.S.C. §§ 4(i), 303, 307, 309 and 310.
[32] *Report and Order*, 15 FCC Rcd at 2337 ¶25 (citing case law "establishing the principle that congressional approval and ratification of administrative interpretations of statutory provisions, including those granting jurisdiction to regulate, can be inferred from congressional acquiescence in a long-standing agency policy or practice").

are available, so far as possible, to all people of the United States*, without discrimination on the basis of race, religion, national origin, or sex.*"[33] The Commission then concluded that :

> a broadcaster can more effectively fulfill the needs of its community, and therefore serve the public interest, when it provides equal employment opportunity to all applicants and employees regardless of race, ethnic origin, color, or religion.[34]

Contrary to the claim of the State Associations, the Commission has not stated its policy objective or goal as "finding real jobs for real people," and the Commission has no obligation to prove that its proposal would find these undefined "real jobs."[35] Instead, in the *Second NPRM*, the Commission emphasizes the goals of anti-discrimination and broad outreach.[36]

The Commission should likewise reject NAB's disingenuous argument that "even if one concedes that the Commission intends its current EEO proposal to prevent discrimination," the *Association* decision somehow renders the Commission's proposal, similar to Option A of the former rules, insufficient.[37] The *Association* court declined to sever Option A from Option B *not* because Option A would fail to achieve the Commission's anti-discrimination goals but because the Commission had not considered the loss of flexibility in eliminating Option B.[38] Moreover, in denying rehearing, the court specifically stated that "in a renewed rulemaking effort the Commission may adopt other measures to accommodate the concerns it expressed about broadcasters' need for flexibility in general" or retain Option A but "change its goals."[39] In the *Second NPRM*, the Commission considered whether its current proposal meets broadcasters'

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[33] *See Report and Order*, 15 FCC Rcd at 2349-50 ¶ 48, citing 47 U.S.C. § 151 (2002) (emphasis added to indicate language added by 1996 Act).
[34] *Report and Order*, 15 FCC Rcd at 2349 ¶ 49.
[35] *State Associations* at 5, 10, 54.
[36] *Second NPRM* at 5 ¶ 16. "This Second NPRM is issued pursuant to authority contained in Sections 1, 4(i), 4(k), 257, 301, 303(r), 307, 308(b), 309, 334, 403, and 634 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(k), 257, 301, 303(r), 307, 308(b), 309, 334, 403, and 554." *Second NPRM* at 18 ¶ 62.
[37] *NAB Comments* at 67.
[38] *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d at 22.
[39] *MD/DC/DE Broadcasters Ass'n v. FCC*, 253 F.3d 732, 736 (D.C. Cir. 2001), *denying reh'g of* 253 F.3d 732, *cert. den. sub nom. MMTC v. MD/DC/DE Broadcasters Ass'n*, 122 S.Ct. 920 (2002).

needs for flexibility and found "that it will afford broadcasters and cable entities considerable flexibility in fashioning a recruitment program that is effective and suitable in the their markets."[40]

In sum, after *Lutheran Church*, the Commission clearly established that it had the legal authority, indeed a legal obligation, to adopt EEO rules in its *Report and Order*. The *Association* court did not question the Commission's findings on this point and suggested that the Commission could further act to refine its EEO rules.

B. None of the Arguments Advanced by Commenters Negate This Legal Authority, And, Therefore, the Commission Should Not Hesitate to Adopt Revised EEO Rules

Some commenters have advanced a number of arguments in an attempt to discredit the Commission's power,[41] but these unpersuasive arguments based on vacating previous EEO rules, Congressional silence, and limitations of other civil rights statutes do not undermine the Commission's authority to promulgate and enforce its rules.

For example, the State Associations argue that if the EEO rules were indeed required by statute, the court could not have vacated the former EEO rules.[42] This argument, however, ignores the obvious ability of a court to vacate a rule without abrogating the underlying statutory authority.[43] Indeed, despite vacating the EEO rules in *Association*, the D.C. Circuit explicitly acknowledged that the Commission may adopt a new regulatory structure "in a renewed

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[40] *See Second NPRM* at ¶ 20.
[41] *See NAB Comments* at 63-72; *State Associations Comments* at 29-34.
[42] *State Associations Comments* at 31.
[43] *See, e.g.*, *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1053 (D.C. Cir. 2002); *Illinois Public Telecommunications Association v. FCC*, 123 F.3d 693, 693-94 (1997) ("Thus we have vacated FCC rules even when we have 'not foreclose[d] the possibility that the Commission may develop a convincing rationale' for re-adopting the same rule on remand.") (citing *Petroleum Communications, Inc. v. FCC,* 22 F.3d 1164 (D.C. Cir. 1994).

rulemaking effort."[44] Courts routinely vacate specific agency regulations yet confirm the agency's statutory obligation and authority to implement regulations. For instance, in *Time Warner Entertainment Co. v. FCC*, the D.C. Circuit affirmed the Commission's legal authority to impose limits on cable operators while finding that some of the limits set by the Commission did not pass arbitrary and capricious review.[45]

The State Associations also assert that Congressional silence since the *Lutheran Church* and *Association* decisions somehow limits the Commission's ability to adopt new rules.[46] However, Supreme Court jurisprudence establishes that, if anything, Congressional silence often reflects acquiescence and approval.[47] "Acquiescence by Congress in an administrative practice may be an inference from silence . . . .The inference is strengthened when . . . during some of those years the [practice] was under fire."[48] Moreover, the 1996 amendment to the Communications Act provides support for the Commission's EEO authority by adding anti-discrimination language to the Commission's public interest mandate.[49] Thus, if anything, recent Congressional silence shows Congress' continuing support for the EEO rules.

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[44] *MD/DC/DE Broadcasters Ass'n v. FCC*, 253 F.3d 732, 736 (D.C. Cir. 2001), *denying reh'g of* 253 F.3d 732, *cert. den. sub nom. MMTC v. MD/DC/DE Broadcasters Ass'n*, 122 S.Ct. 920 (2002).

[45] 240 F.3d 1126, 1129-30, 1131-34 (D.C. Cir. 2001); see also *GTE Service Corporation v. FCC*, 205 F. 3d 416, 424-26 (D.C. Cir. 2000) (finding the Commission had the legal authority under Section 251(c)(6) of the Communications Act to promulgate reasonable rules regarding physical collocation but that the specifics of the Commission's rules went beyond what Section 251(c)(6) reasonably required: "the [Commission] will have an opportunity to refine its regulatory requirements to tie the rules to the statutory standard.")

[46] *State Associations Comments* at 31.

[47] *See, e.g., Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843-44 (1984); *Haig v. Agee*, 453 U.S. 280, 300-06 (1981) (Long-standing interpretation by the Secretary of State of its power under Passport Act of 1926 as encompassing the power to revoke passports to prevent damage to national security or foreign policy was ratified by congressional acquiescence, even though Secretary exercised power infrequently); *Zemel v. Rusk*, 381 U.S. 1, 13 (1965). (Congressional acquiescence may sometimes be found from nothing more than Congressional silence with respect to an administrative policy); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 313-15 (1933). *See also Report and Order*, 15 FCC Rcd at 2339 ¶ 26.

[48] *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. at 313.

[49] *The Telecommunications Act of 1996,* Pub. L. No. 104-104, 110 Stat. 56, §104 (1996) (amending 47 U.S.C. § 151 to add "without discrimination on the basis of race, color, religion, national origin, or sex . . . ." to the Commission's mandate to regulate interstate and foreign communications services). *See Report and Order*, 15 FCC Rcd at 2349-50 ¶ 48.

Additionally, the State Associations' apparent contention that the Commission can only prohibit discrimination directly proscribed by the Constitution or the Civil Rights Act[50] is inaccurate and does not undermine the Commission's EEO authority. First, the State Associations fail to acknowledge that while some laws, such as Title VI of the Civil Rights Act of 1964, may be limited to intentional discrimination, agencies acting under authority of those laws can prohibit unjustifiable disparate impact, regardless of the existence of discriminatory intent.[51] Even if the Constitution itself or another statute only prohibited intentional discrimination, those laws would not prevent the Commission from acting pursuant to its authority under the Communications Act to address discrimination that is not purely intentional. As the Commission's Chairman Michael K. Powell has stated in this proceeding, "[i]f the public interest benefit means anything at all it cannot possibly tolerate the use of a government license to discriminate against citizens from whom the license is ultimately derived."[52]

Second, despite the State Associations' inferences otherwise, even the Constitution and Title VII of the Civil Rights Act of 1964 do prohibit word-of-mouth recruitment in many cases.[53] Some courts, including the Supreme Court, have found that "word-of-mouth [recruitment] can

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[50] *State Associations Comments* at 34.

[51] *See Guardians Assn. v. Civil Service Comm'n of the City of New York*, 463 U.S. 582, 593 (1983). *See also Alexander v. Choate*, 469 U.S. 287, 293-294 (1985); Gil Kujovich, Desegregation in Higher Education: The Limits of a Judicial Remedy, 44 BUFF. L. REV. 1, 65 (Winter 1996).

[52] *Second NPRM*, Separate Statement of Chairman Michael K. Powell.

[53] *See, e.g., Domingo v. New England Fish Co.*, 727 F.2d 1429, 1435-36 (9th Cir. 1984); *NAACP v. Evergreen*, 693 F.2d 1367, 1369 (11th Cir. 1982); *United States v. Georgia Power*, *Co.* 474 F.2d, 906, 925-26 (5th Cir. 1973); *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421, 427 (8th Cir. 1970) (finding existing white employees tend to refer members of their own race, thus perpetuating racial disparities); *United States v. Elmwood Park*, 1987 WL 8162 (N.D. Ill. 1987); *NAACP v. City of Corinth*, 83 F.R.D. 46, 62 (N.D. Miss. 1979); *Kyriazi v. Western Electric Co.*, 461 F.Supp. 894 (D.N.J. 1978), *vacated on other grounds* 473 F.Supp. 786 (D.N.J. 1979); *Nance v. Union Carbide Corp.*, *Consumer Products Div.*, 397 F.Supp 436 (W.D.N.C. 1975), *cause remanded* 540 F.2d 718 (4th Cir. 1976), *vacated on other grounds and cert. denied,* 431 U.S. 952 (1977); *Clark v. American Marine Corp.*, 304 F.Supp. 603 (E.D. La. 1969).

In fact, in *EEOC v. Consolidated Service Systems* cited by State Associations, the Court only held that word-of-mouth recruitment does not give rise to the inference of intentional discrimination in the absence of evidence that the owner was biased or prejudiced against any group underrepresented in its workforce. 989 F.2d 233 (7th Cir.1993).

have a chilling effect on potential minority applicants if an employer's reputation reasonably leads potential minority job seekers to believe that submitting an application would be futile."[54] The Seventh Circuit decided that it could not conclude "as a matter of law [that] it is impossible for an employer to discriminate intentionally against blacks by relying on word-of-mouth to provide its applicants."[55] Thus, to the extent that Commission's proposal discourages word-of-mouth recruiting, it is well-grounded in established jurisprudence.[56]

III. THE COMMISSION SHOULD REJECT PROPOSALS THAT UNDERMINE THE ACHIEVEMENT OF BROAD OUTREACH AND DETERRENCE OF DISCRIMINATION

Many industry commenters affirmatively support the Commission's proposed outreach program. For instance, the National Cable and Telecommunications Association (NCTA), "support[s] the adoption of EEO rules that deter racial and gender discrimination in hiring and promote broad outreach."[57] Also, Radio One, a broadcaster, does not find the Commission's proposal unreasonable or burdensome,[58] further confirming that the Commission's EEO rules are beneficial and "now more necessary than ever."[59]

However, after trying to discount the need for an EEO program, NAB and the State Associations propose alternatives that are inadequate to achieve the Commission's goals of

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[54] Guide to Employment Law and Regulation, Part II. Fair Employment Practices--Civil Rights Law, Chapter 2. Civil Rights Law--Title VII, III. What Is Forbidden, § 2:15 DISCRIMINATION IN HIRING AND PROMOTION, 2nd Edition (2002) (*citing International Bhd. Of Teamsters v. United States*, 431 U.S. 324, 364-67 (1977); *Mister v. Illinois Cent. Gulf R.R. Co*., 832 F.2d 1427 (7th Cir. 1987); *E.E.O.C. v. Joe's Stone Crab, Inc.*, 969 F.Supp. 727 (S.D. Fla. 1997).

[55] *EEOC v. Chicago Miniature Lamp Works*, 947 F.2d 292, 298 (7th Cir. 1991).

[56] *See Second NPRM* at ¶ 28. Note that the Commission's proposal only discourages, but does not prohibit, word-of-mouth recruiting. Interestingly, despite their inference that abrogating word-of-mouth recruiting is an impermissible goal, the State Associations themselves flaunt their proposed model program as a means of eliminating word-of-mouth recruiting. *State Associations Comments*, Exhibit B at 16, 21, 26.

[57] *NCTA Comments* at 3. *See also* Federal Communications Commission, *1999 Cable and Multi-Channel Video Program Distributor Employment Report* (2001).

[58] *Radio One Comments* at 2.

[59] *Radio One Comments* at 5.

deterring discrimination and broad outreach. NOW *et al.* urge the Commission to reject these alternative proposals.

A. The Commission Should Again Reject NAB's Outreach Proposal, Which Lowers the Standard for Compliance with EEO Rules and Will Likely Result in Little Outreach

NAB's outreach proposal, which the Commission has already deemed inadequate once before,[60] would require broadcasters to complete only one of three options: (1) comply with the Office of Federal Contract Compliance Program (OFCCP) requirements; (2) complete the broadcaster's state broadcaster association's National Alliance of State Broadcasters Associations (NASBA)-based "Broadcast Careers Program" ("model program"); or, (3) complete a combination of specific and general of outreach initiatives.[61] NOW *et al.* oppose NAB's proposal because it will foster little outreach activity and fail to advance the Commission's goals. In fact, activities not even sufficient to meet just one of the Commission's proposed outreach prongs would completely fulfill the minimal outreach required by NAB's proposal. For instance, an employment unit could entirely meet NAB's proposed outreach responsibilities by completing two of the Commission's supplemental activities every four years, whereas the Commission's proposal would require eight such activities in that same four-year period in addition to wide vacancy dissemination and notification. Clearly, the Commission should require more than these minimal efforts to foster outreach and deter discrimination.

[60] In 1998, NAB made a nearly identical outreach proposal, which was not adopted by the Commission. *See Report and Order*, 15 FCC Rcd 2366 ¶¶81, 86-106.
[61] *NAB Comments* at 17.

1. NAB's OFCCP Option Will Have Only a Minimal, If Any, Impact on Outreach

Under the first option of NAB's proposal, broadcasters that comply with the OFCCP requirements[62] would be deemed to have satisfied the Commission's EEO requirements. The OFCCP regulations ban discrimination and require contractors or subcontractors with a federal contract of $50,000 or more and fifty or more employees to develop a written affirmative action program.[63] NAB states that only those subject to the OFCCP regulations would select this option.[64] Given the threshold requirements, the OFCCP option will likely cover very few broadcasters or cable entities, and NAB does not provide any information about the number of broadcasters and cable entities that must independently comply with OFCCP requirements.

Further, in previously rejecting OFCCP compliance in lieu of EEO rules, the Commission noted that the involvement of another regulatory agency would be confusing to the public and would significantly complicate enforcement of the EEO rules, particularly in addressing situations where an entity claimed OFCCP compliance but was later found by OFCCP to be in violation.[65] Because of these administrative difficulties and the minimal number of entities impacted by the OFCCP rules, the Commission should again reject NAB's first proposed option.

2. NAB's Model Program Option Lacks Clarity and Fails to Require Any Meaningful Outreach

NAB's second option would permit stations to merely certify participation in their state association's model program in complete fulfillment of their EEO obligations. Because the state model programs may vary greatly and merely suggest, but do not require, possible outreach

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[62] Office of Federal Contract Compliance Programs, Employment Standards Administration, Department of Labor, Affirmative Action Fact Sheet (2002), *at* http://www.dol.gov/esa/regs/compliance/ofccp/aa.htm (last visited May 25, 2002) [hereinafter OFCCP Fact Sheet].

[63] OFCCP Fact Sheet.

[64] When describing its proposed reporting requirements, NAB stated that a broadcast licensee would merely certify that it is subject to the OFCCP regulations and is in full compliance with those rules. *NAB Comments* at 27-28. Therefore, NAB must assume that only those employment units already subject to the OFCCP regulations will fulfill its EEO obligations through this option.

"highways,"[66] this option will not effectively further outreach. Even the State Associations' Model Broadcast Career Road Map referenced by NAB fails to detail specific responsibilities and instead uses vague and permissive language about what stations "would be encouraged" to do.[67]

NAB disingenuously touts these *suggested* activities, such as educational cooperation and career seminars, but then acknowledges that its current proposal is much narrower, encompassing only limited Internet recruitment and vacancy notifications.[68] However, primary reliance on the Internet would not result in sufficient outreach as NOW *et al.* have already demonstrated that almost half of Americans do not use the Internet, and more recent reports indicate that sixty percent of African-Americans and seventy percent of Hispanic-Americans have no access to the Internet.[69] Moreover, the Commission has previously rejected use of the Internet as the primary recruitment source, and in the *Second NPRM*, the Commission currently questions whether Internet outreach would be sufficient to fulfill even one prong of the Commission's three-part outreach requirements.[70] Further, although NAB promotes the model program as an "unqualified success,"[71] a search of NASBA's CareerPage, the cornerstone of the model program, reveals that most states listed no job postings.[72] Without job postings, broadcasters are not even furthering outreach to those who do have Internet access.

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[65] *Report and Order* 15 FCC Rcd at 2383 ¶ 133.
[66] *State Associations Comments,* Attachment A.
[67] *See NAB Comments* at 19-21; *State Associations Comments* at Exhibits A, B. (e.g., evaluating school curriculum, holding seminars, sponsoring mentorship programs).
[68] *NAB Comments* at 20.
[69] *NOW Comments* at 6-8; Robert MacMillan, *Larry Irving: Digital Divide Lives, Few People Care* (April 18, 2002), *available at* http://www.newsbytes.com/news/02/176000.html (last visited May 6, 2002).
[70] *Report and Order*, 15 FCC Rcd at 2370 ¶ 91; Second *NPRM* at 9, ¶26.
[71] *NAB Comments* at 21.
[72] *See* NASBA CareerPage at http://www.careerpage.org/jobbank/index.html, searched for all postings from 1/1/01 through 5/6/02 on 5/6/02.

In addition, although NAB suggests that the model program incorporates a job vacancy notification requirement,[73] at best, the model program suggests that state associations consider sending some organizations letters with information about the association's Careers Program, not specific job vacancies.[74] Providing general notice of a career resource on a voluntary basis is in no way comparable to the second prong of the Commission's proposed notification rules, which requires certain job vacancy notices, and hardly amounts to broad outreach.

Even if the model program's requirements were clear and the suggested activities were actually required, the program cannot overcome administrative and enforcement hurdles. Some broadcasters operate across numerous states and would have to alter practices according to a myriad of possibly conflicting programs. Also, in the *Report and Order*, the Commission has acknowledged, "the actual components of particular [state association's model] programs will vary[, and t]he existence of different requirements in different states would be confusing to the public and difficult to enforce."[75] Thus, because NAB's model program would not mandate any meaningful, defined level of participation, and would present administrative and enforcement difficulties, it will not efficiently advance the Commission's goals.

3. NAB's General and Specific Initiatives Option Will Likely Result in Insignificant Outreach and Thus Undermines the Commission's Equal Opportunity Goals

The third option of NAB's proposal (for those entities not choosing the OFCCP or model program options) would mandate the least amount of outreach and merely require broadcasters and cable entities complete (a) two "general initiatives," (b) one "general" and two "specific" initiatives, or (c) four "specific initiatives."[76] Some of the proposed general initiatives are similar

[73] *NAB Comments* at 20.
[74] *NAB Comments* at 20; *State Associations Comments* at Attachment A, 10.
[75] *Report and Order*, 15 FCC Rcd at 2370 ¶ 91.
[76] *NAB Comments* at 22.

to the supplemental activities proposed by the Commission as part of its proposal.[77] However, NAB's third option would require significantly less outreach than the Commission's proposal, which would require completion of eight supplemental activities every four years in addition to other requirements.[78] Similarly, the majority of NAB's proposed specific initiatives seem to resemble the standard recruitment efforts contemplated under the Commission's wide dissemination prong.[79] As a result, broadcasters and cable entities could arguably fulfill their complete EEO obligations by performing what the Commission requires alone under the dissemination part of its current proposal. Finally, because NAB's lists of initiatives are not exhaustive and NAB does not set any minimal initiative standards, [80] entities would be free to design their own illusory initiative in an effort to circumvent outreach responsibilities. Thus, NAB's third option mandates little, if any, meaningful outreach.

As shown above, because each of the options that entities may select under NAB's proposal is likely to result in minimal outreach, permitting one of those options to completely fulfill an entity's EEO obligations would thwart the Commission's anti-discrimination and outreach goals. Accordingly, the Commission should again reject NAB's EEO proposal.

B. The State Associations' Outreach Proposal Potentially Excludes Half of Industry Vacancies and Does Not Promote Outreach to All Groups

The State Associations' proposal would require broadcasters to post at least fifty percent of their job vacancies on Internet websites, to promote these websites on air, and to provide notice of vacancies to requesting organizations.[81] By allowing stations to do no outreach for up

[77] *See NAB Comments* at 23-24; *Second NPRM* at ¶30 (*e.g.*, participating in or sponsoring job fairs, scholarship programs, and internship programs).
[78] *See NAB Comments* at 23-24; *Second NPRM* at ¶29.
[79] Report and Order, 15 FCC Rcd at 2368 ¶ ¶ 85; *See NAB Comments* at 25-26; *Second NPRM* at ¶¶ 23, 26 (*e.g.*, job postings in publications or on websites).
[80] *See NAB Comments* at 23.
[81] *State Associations Comments* at 43.

to half of job openings, the plan would thwart the Commission's anti-discrimination goals.[82] As the Commission has acknowledged, "recruitment for all full-time hires is essential to meaningful outreach"[83] because "recruitment for only some openings could leave the most desirable positions open to a limited number of potential applicants, possibly excluding significant segments of the community."[84]

Even if the State Associations' proposal required Internet posting of all vacancies, like NAB's model program, this proposal would still be insufficient to achieve broad outreach.[85] As NOW *et al.* and other commenters have shown, many people still do not access or use the Internet,[86] and, Internet job banks are not yet well established and do not provide comprehensive statewide job listings.[87] While the State Associations' proposal to require that stations promote the location of the job bank websites over the air is a constructive addition, this alone cannot overcome the problems of excluding up to half of the vacancy notices and primary reliance on the Internet.

IV. BOTH THE PUBLIC AND THE COMMISSION MUST HAVE ACCESS TO MEANINGFUL EEO REPORTS AND RECORDS IN ORDER TO PROMOTE CONTINUING IMPLEMENTATION OF EFFECTIVE EQUAL OPPORTUNITY PROGRAMS

As the Commission and NOW *et al.* have asserted, effective reporting and recordkeeping requirements encourage compliance with EEO outreach requirements and promote the

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[82] *See State Associations Comments* at 47. Such a plan may permit a station to use insular or word-of-mouth recruiting for certain job vacancies, such higher management levels, which could perpetuate the current underrepresenation of women and minorities at higher levels.
[83] *Report and Order*, 15 FCC Rcd at 2368 ¶ 85; *Second NPRM* at ¶¶ 20, 23.
[84] *Report and Order*, 15 FCC Rcd at 2368 ¶ 85. *Second NPRM* at ¶¶ 20, 23.
[85] *See NCTA Comments* at 5. *NOW Comments* at 8.
[86] *NOW Comments* at 6-8.
[87] For example, on the NASBA's CareerPage, many states have no job vacancies posted. NASBA CareerPage at http://www.careerpage.org/jobbank/index.html (searched for all postings from 1/1/01 through 5/6/02 on 5/6/02). The Commission has suggested that broadcasters would need to establish, among other things, that Internet job banks are well-established and provide comprehensive statewide job listings before it would consider sanctioning Internet job banks as the sole dissemination mechanism. *Report and Order*, 15 FCC Rcd at 2369 ¶ 87.

implementation of continuing and effective EEO programs.[88] Accordingly, the Commission should adopt reporting and recordkeeping requirements proposed by NOW *et al.* in their initial comments and should reject those suggested by both NAB and State Associations. Because both NAB's and the State Associations' limited reporting and recordkeeping proposals, [89] which are little more than certifications of compliance, are intertwined with their inadequate outreach proposals, they fail to provide enough information to serve the Commission's purposes. Despite the obvious inadequacy of NAB's and the State Associations' reporting and recordkeeping proposals, their additional proposals to limit public access to information and to allow broadcasters merely to certify compliance, as well as their misleading claims of burden, warrant separate mention.

A. Public Access To EEO Records Is Essential to EEO Enforcement And Advancement Of Broad Outreach

As the Commission has stated, "meaningful, ongoing communication between a broadcaster and the public will result in a more effective outreach program."[90] Specifically, public access to station records and the public file report is crucial to validate the extent of a station's outreach efforts and to expeditiously resolve potential EEO problems.[91] Nonetheless, both NAB and the State Associations fail to include necessary public file report and discrimination complaint information in their proposed rules. The State Associations further advocate *prohibiting* public access to stations' supporting documentation,[92] and NAB "fails to see any benefit" to placing annual EEO reports in stations' public files or on the Internet.[93]

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[88] *See Second NPRM* at ¶ 37; *NOW Comments* at 13.
[89] *NAB Comments* at 27-28; *State Associations Comments* at 54-55.
[90] *Reconsideration of the Federal Communications Commission In the Matter of Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, 15 FCC Rcd at 22,557 ¶ 30 (*"Recon."*).
[91] *Second NPRM* at 11-12 ¶ ¶ 32, 38.
[92] *State Association Comments* at 55.
[93] *NAB Comments* at 28, 60.

The Commission should reject these proposals to eliminate or restrict public access to EEO records, particularly the public file reports, which supply the only meaningful source of public information.[94] As the Commission noted, the public performs an integral role in the monitoring process, because "the public can bring to a broadcaster's attention a problem of which it might not otherwise be aware."[95] And, due to the Commission's limited resources, random audits and Commission oversight are not sufficient means for enforcement.[96] Additionally, the Commission should reject any proposals that do not require employment units to place these public file reports on the Internet,[97] which would give the public easier, more efficient access to the reports and promote dialogue between stations and their communities.[98]

Current access to stations' public files is inadequate for several reasons. First, the Commission recently expanded the area in which licensees may locate their main studios containing the station's public files,[99] which may be located outside of the station's community of license. Even assuming the studio is located in an area reasonably accessible to the public by car, it may not be accessible via mass transit. Moreover, many studios may not be accessible for people with disabilities. Requests by individuals that information be sent to them[100] creates an additional burden and costs.

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[94] *AWRT Comments* at 14-15.
[95] *Recon*, 15 FCC Rcd at 22,557 ¶ 30.
[96] *Report and Order*, 15 FCC Rcd at 2379 ¶ 123. In fact, the Commission places so much value on public participation that it questions use of random audits as an enforcement tool because of the entailing limited public participation. *Second NPRM* at ¶ 43.
[97] *See e.g., NAB Comments* at 29-33; *State Associations Comments* at 53.
[98] *See NOW Comments* at 17; *Second NPRM* at ¶¶ 38, 43.
[99] The Commission adopted a requirement that allows a station to locate its main studio at any location that is within either the principal community contour of any station, of any service, licensed to its community of license or 25 miles from the reference coordinates of the center of its community of license, whichever it chooses. *See Review of the Commission's Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations, Report and Order,* 13 FCC Rcd 15691, 15694 (1998) (*Main Studio and Local Public Inspection Files Order)*.
[100] 47 C.F.R. § 73.3526(c)(2000).

Second, the stations themselves often do not provide adequate access to the files. For instance, public commenters have encountered significant obstacles in accessing several Washington, D.C.'s television stations' public files.[101] Station employees at one station told an intern to make an appointment and return another day, in violation of FCC rules.[102] Other public commenters reported that its members had been harassed, treated as security risks, and asked to make appointments only to return as scheduled to find the contact person unavailable.[103] Finally, many of the stations' files are misplaced and incomplete, and staffers are woefully unfamiliar with file contents.[104] In light of these obstacles to public access, providing the public files on the Internet would enhance access to a growing number of Internet users and enable members of the public to more actively participate in addressing community needs and interests.[105]

B. Certifications Of Compliance Are Meaningless And Do Not Advance The Commission's EEO Goals

Relying primarily on statements of compliance with the EEO rules would fail to serve the public interest and create enforcement difficulties for the Commission. The State Associations and NAB advocate essentially limiting their EEO reporting obligations to mere certifications of

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[101] An intern for UCC *et al.* visited W*USA, DC on January 17, 2001; FOX 5 WTTG DC on January 18, 2001; and WRC-TV, DC and WJLA, DC on January 19, 2001. *In the Matter of Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations,* MM Dkt. No. 00-168 ("Disclosure NPRM"), Reply Comments of UCC *et al.* at 30-31. This problem is apparently not endemic to the Washington, D.C. area. For example, as recently as September 21, 2000, the Commission adopted a notice of apparent liability for a ten thousand dollar forfeiture for station WIMX (FM) in Gibsonburg, Ohio, for violating the Commission's public files rules *See Riverside Broadcasting, Inc., Notice of Apparent Liability for Forfeiture*, 15 FCC Rcd 18322 (2000)(station fined for denying access to its public inspection files and failing to maintain a complete public file).

[102] Section 1.526(d) of the Commission's Rules provides: The [public] file shall be maintained at the main studio of the station... [and] *shall be available for public inspection at any time during regular business hours* (emphasis added) quoted in *Availability of Locally Maintained Records for Inspection by Members of the Public*, 28 FCC 2d 71 (1971). *See also Public Notice*, 1998 FCC LEXIS 5022 (1998) (reissuing the statement the FCC made in 1971 regarding the availability of locally maintained records for inspection by members of the public).

[103] Disclosure NPRM, People for Better TV Comments filed Dec. 18, 2000, at 12.

[104] This is consistent with other viewers' experiences. At a station in Chicago, files from children's programming were not available, and the building assistant did not even know if they had a file for children's programming. *Disclosure NPRM*, PBTV Comments at 5.

compliance[106] as opposed to the annual public file report and midterm report proposed by the Commission. However, the Commission has emphasized the importance of its proposed requirements, which include more than bare certifications, commenting that "if we lack the ability to monitor the developments in the industry, we will be unable to provide the necessary guidance that will enable the industry to ensure that its efforts are consistent with our expectations."[107]

Also, as noted above in Section II.A., the Commission must ensure that all broadcasters and cable entities are licensed in accord with its public interest mandate.[108] Without reporting and recordkeeping, the Commission and the public would not be able to detect if an entity has falsely certified that it has complied with Commission rules.[109] The Commission would be unable to enforce its carefully-designed rules, and hence, fail to act in accord with its Congressional mandate to regulate the industry in the public interest.

C. Costs Associated With Posting Annual Public File Reports Are Not Unreasonable Nor As Great As Some Broadcasters Claim

Many commenters confirm that the public file reports do not involve a great expense or impose an undue burden, especially in comparison to the importance of the goals underlying the EEO rules.[110] NCTA affirmed that the "not unduly burdensome [reporting and recordkeeping] provisions effectively balance the Commission's and the public's information needs with the costs of providing it."[111] Further, as NOW *et al.*'s comments show, posting the reports on the Internet places no undue burden on employment units, most of which already maintain

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[105] *See Second NPRM* at ¶ 38.
[106] *State Associations Comments* at 54-55; *NAB Comments* at 27-28 (NAB would also require an exhibit list of outreach activities).
[107] *Second NPRM* at ¶ 43.
[108] 47 U.S.C. § 307(c).
[109] A random audit policy would not be enough to expose every instance of malfeasance.
[110] *See AFTRA Comments*; *AWRT Comments*; *MMTC Comments*; *NAACP Comments*; and *Radio One Comments*.
[111] *NCTA Comments* at 3.

websites.[112] Even NAB's current proposal reflects the minimal burden entailed with Internet posting as it would require that stations post job vacancies on websites.

NAB relies on stale data, exaggerates the costs of maintaining online files, and overlooks the public benefit of providing station and Internet access to the annual EEO report. First, NAB's data regarding the online capabilities of broadcasters is outdated. According to a recent RTNDA/Ball State University Radio and Television Web Survey, ninety-one percent of TV stations and seventy-five percent of radio stations operate websites.[113] Ninety-one percent of TV stations post local news and seventy percent run images on their sites.[114] Most larger market stations generally have incredibly sophisticated websites with advanced search mechanisms, extensive archives, hourly news updates, interactive polling and daily weather forecast maps that feature radar and satellite images.[115] Many midsize and smaller market stations have advanced websites.[116] Further, stations in at least fifty major markets have begun offering personalized weather forecasts that feature twenty-four hour access to weather updates for specific neighborhoods.[117] Many stations have even added extensive pollen reports, allergy updates, flu forecasts and daily lottery results to their sites.[118] Thus, any increase in a station's website memory to provide public interest information would likely be minimal compared to its current large and growing capacity.

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[112] *NOW Comments* at 17-18.
[113] Radio-Television News Directors Association & Foundation & Ball State University, *RTNDA/Ball State University Radio and Television Web Survey* (2001), *available at* http://www.rtnda.org/technology/web.shtml#survey [hereinafter *Web Survey*].
[114] *Web Survey*.
[115] *See, e.g.,* W*USA-DC, *available at* http://www.wusatv.com; WABC-TV NY, *available at* http://abclocal.go.com/wabc; and WCVB-TV Boston, *available at* http://www.TheBostonChannel.com.
[116] *See, e.g.,* KDVR-Denver, *available at* http://www.fox31.com/pghom.html; WAVE 3 Louisville, Kentucky, *available at* http://www.wave3.com/; KSWO Lawton, Oklahoma, *available at* http://www.kswo.com/; KVVU-TV Henderson, Nevada, *available at* http://www.kvvutv.com.
[117] *My-Cast (SM) Offers Most Personalized, Precise Weather Forecast Ever Available to Consumers* (Sept. 19, 2000), *available at* http://www.prnewswire.com.
[118] *Worldnow to Provide Partners with Daily Updates on Pollen, Flu and Lottery Results* (Jan. 29, 2001), *available at* http://www.worldnow.com.

Moreover, ninety-one percent of radio news directors and eighty-one percent of TV news directors do not view maintaining their websites as a drain on resources,[119] so updating the files online would not be as unduly burdensome as NAB contends. Many broadcasters' websites are already updated on a daily, even hourly basis.[120] In addition, converting and maintaining the public file contents to the Internet may actually save broadcasters money because they would avoid paying staffers to copy and physically compile the documents. Licensees could also reduce the storage costs in maintaining paper by converting their files to a database made accessible online.

Not only do online posting requirements for stations' public files impose a minimal burden on broadcasters, the benefits to the public in gaining access to the files outweigh any of the minor burdens. As discussed above in Section IV.A., providing Internet access to the files aids the Commission's enforcement duties and fosters crucial interaction among broadcasters and their viewers.

V. THE COMMISSION SHOULD REJECT EXEMPTIONS THAT WOULD ENGULF THE EEO RULES AND THWART THE COMMISSION'S BROAD OUTREACH GOALS

The Commission must ensure that exemptions do not swallow the EEO rules and subvert the Commission's worthy anti-discrimination and outreach goals. For example, the Commission should reject NAB's suggestion that an exemption from EEO requirements should be extended to stations in areas with a low minority population and smaller market stations.[121] The low minority population exemption is unnecessary because the Commission no longer compares stations' employment statistics with those local labor force statistics, nor "require[s] recruitment

[119] *Web Survey*.
[120] *See, e.g.,* W*USA-DC, *available at* http://www.wusatv.com.
[121] *NAB Comments* at 57-59.

methods that specifically target minority or female applicants."[122] And, a smaller market exemption would deter outreach, as many entry-level opportunities emerge at these stations.[123] Regardless, because NAB has not detailed how many stations its proposed exemptions might affect, an expansion of the exemptions also would be arbitrary and capricious.

Further, the Commission should not extend the exigent circumstances exemption to the wide dissemination requirement.[124] As NCTA established, the wide dissemination requirement "is fundamental to the Commission's EEO outreach program" because [i]t establishes the general principle that whenever a full-time vacancy becomes available, [an employment unit] will engage in a process that will offer all prospective employees, including minorities and women, an equal opportunity to be considered for the position."[125] Allowing further exemptions to the core of the Commission's outreach program could easily permit entities to avoid their EEO obligations at the expense of the public.

In addition, any exemption for unique jobs[126] would exclude exactly those upper level positions for which broad outreach is the most necessary due to the continuing exclusion of minorities and women from these positions.[127] Similarly, any exemption based on purported "futility of recruitment"[128] would completely undermine broad outreach and perpetuate word-of-mouth recruitment. NAB states that the General Manager will often already be familiar with *every prospect* for a particular position in the entire state, and therefore the Commission should not require the employment unit to disseminate vacancy information for these vacancies.[129] Any exemption based on this supposed omnipotent power to foresee and know all potential job

[122] *Report and Order*, 15 FCC Rcd at ¶ 173. *See also Recon*, 15 FCC Rcd at 22,553 ¶ 14.
[123] *Report and Order,* 15 FCC Rcd at 2380-81 ¶ 126; *NOW et al. Comments* at 26.
[124] *See NAB Comments* at 46.
[125] *NCTA Comments* at 3-4.
[126] *See NAB Comments* at 47-48.
[127] *NOW et al. Comments* at 2-4.
[128] *See NAB Comments* at 49-50.

candidates would permit complete emasculation of the Commission's rules, allowing a station to always contend it knew of the best candidate and avoid EEO responsibilities. Thus, like the proposed low minority and exigent circumstances exemptions, the unique jobs exemption would virtually engulf the Commission's rule and should be rejected.

Finally, some commenters suggest that the Commission should exempt stations with up to ten full-time employees without addressing the potential impact such an increase would have on outreach.[130] For the reasons stated in their Comments, NOW *et al.* continue to oppose exempting more stations.[131]

VI. THE COMMISSION MUST RETAIN THE ANNUAL EMPLOYMENT REPORTS FOR CONGRESSIONALLY-MANDATED DATA COLLECTION ON INDUSTRY EMPLOYMENT TRENDS

The Annual Employment Reports (Forms 395-B, 395-A, and 395-M) provide the primary means of collecting the data needed to assess broadcast and cable industry employment trends[132] and are not part of the Commission's EEO program requirement.[133] Although the NAB and State Associations claim that no need exists for the Annual Employment Reports,[134] many commenters, including the cable industry, recognize that without the reports, neither the Commission nor any other party can retrieve solid, verifiable data on industry employment figures or determine industry-wide trends.[135]

Contrary to NAB's and the State Associations' arguments, collection of the 395 information is not prohibited by *Lutheran Church*, which did not directly address using 395

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[129] *See NAB Comments* at 47-50.
[130] *See e.g., NAB Comments* at 54-57.
[131] *NOW Comments* at 22-27.
[132] *NOW Comments* at 27-28.
[133] *See Second NPRM* at ¶ 50 (citing 47 C.F.R. § 73.3612).
[134] *NAB Comments* at 60-63; *State Association Comments* at 48-51.
[135] *NCTA Comments* at 15.

forms solely for data collection and trend analysis.[136] More importantly, the D.C. Court of Appeals upheld the reporting requirements of the *Report and Order*, including the 395-B requirement, even when broadcasters made an arbitrary and capricious challenge.[137] The Commission itself has noted that, "[Nothing in the [*Association*] Court's opinion, however, suggests that the collection of the FCC Form 395-B data for the limited purposes for which it is intended is subject to strict scrutiny."[138] Moreover, the FCC has considered and previously rejected many of the State Associations and NAB's arguments, such as those regarding *Lutheran Church* and the use of EEO-1 Reports.[139] Thus, because broadcasters have failed to present any significant impediment to the collection of the Congressionally-mandated industry data, the Commission should retain the Annual Employment Reports.

VII. CONCLUSION

For the above stated reasons, NOW *et al.* urge the Commission to adopt the proposals in NOW *et al*'s Comments and reject the contravening proposals that would not advance the Commission's anti-discrimination and outreach goals.

Respectfully submitted,

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[136] *See State Associations Comments* at 49, citing *Lutheran Church*, 141 F.3d at 353.
[137] *Association*, 236 F.3d at 17.
[138] *Second NPRM*, at ¶ 51.
[139] *See NAB Comments* at 60-62; *Report and Order*, 15 FCC Rcd 2358, 2394-2400, ¶¶ 63-64, 163-178 (rejecting EEO-1 use and the notion that the *Lutheran Church* holding prohibits collection of the 395 data).

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